Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
1993 Annual Access Tariffs	)	CC Docket No. 93-193
1994 Annual Access Tariffs	)	CC Docket No. 94-65

REPLY COMMENTS OF SBC COMMUNICATIONS, INC.

SBC Communications Inc. ("SBC") hereby submits these reply comments in response to AT&T's comments filed in response to the Public Notice issued concerning the foregoing dockets.[1] As SBC demonstrates below, AT&T's arguments should be rejected.

AT&T's has couched its argument in this proceeding as this: the 1993 and 1994 tariffs are unlawful because the Commission in 1995 concluded that "add back" is a necessary part of price-cap regulation. But the Commission has already unambiguously resolved this issue. In the *Add-back Order*,[2] the Commission expressly concluded that its add-back rules could only apply *prospectively* because the Commission is prohibited, under the Administrative Procedure Act (APA) and longstanding federal jurisprudence, from retroactively applying a substantive rule change.[3]

Because the Commission's pre-1995 rules did not obligate price cap LECs to add back, what AT&T has characterized as a "heads I win, tails you lose" position on the part of the LECs

[1] *Further Comment Requested on the Appropriate Treatment of Sharing and Low-end Adjustments Made By Price Cap Local Exchange Carriers in Filing 1993 and 1994 Interstate Access Tariffs*, Public Notice, DA 03-1101, CC Docket Nos. 93-193, 94-65 (April 7, 2003) (Public Notice).

[2] *Price-Cap Regulation of Local Exchange Carriers, Rate-of-Return Sharing and Lower Formula Adjustment*, Report and Order, 10 FCC Rcd 5656 (1995) (*Add-back Order*).

[3] *Id.* at 5665.

actually reflects the fact that each company made a reasonable decision in the absence of a Commission requirement. The Commission must not be fooled by what AT&T is trying to do here. There is no *outstanding* issue. AT&T's arguments are a veiled attempt to get a second bite at the apple, that is to challenge — *eight years after the fact* —the Commission's express decision not to retroactively apply its 1995 add-back rules. AT&T clearly has no right to seek such untimely reconsideration, accordingly, AT&T's arguments should be rejected.

AT&T argues that the *Add-back Order* was merely a *clarification* of the existing price cap rules, which all along required LECs to follow the add-back rules. Thus, according to AT&T, "the Commission has already resolved the central issue in this case." AT&T is right that the central issue in this case has already been resolved, and conclusively so, but not as AT&T suggests. To the contrary, the Commission has expressly concluded that its add-back rules were *not* a clarification, but rather a substantive rule change that could only be applied prospectively. Specifically, the FCC stated,

> Several commenters allege that an add-back adjustment would constitute a substantive change to (as opposed to a clarification of) the price cap rules and, therefore, cannot be applied retroactively to render existing LEC tariffs unlawful….*We agree with commenters that the explicit add-back rule adopted here may, as a legal matter, be applied only on a prospective basis.* Accordingly, this rule will first be applied when carriers file their 1995 access tariffs.[4]

There is no question that add back was not required of price-cap LECs prior to 1995, and that a substantive rule change was necessary to impose such an obligation. Thus, the Commission already clearly rejected AT&T's position.

AT&T next argues that add-back was *implicit* in the initial price cap rules, thus, every LEC should have known that add back was required. But this is just another version of the same specious argument. AT&T relies wholly on the fact that the Commission ultimately held in 1995

[4] *Id.* at 5664-65 (emphasis added).

that add back was a necessary part of price cap regulation. But as just shown, the Commission conclusively determined in 1995 that its add-back rules constituted a substantive change to the price cap rules that could only be enforced prospectively, which necessarily means that add back was not *implicit* in price cap regulation prior to 1995.

This is not the first time AT&T has sought to retroactively apply a Commission rule change. AT&T's arguments here suffer from the same procedural infirmities as AT&T's arguments in the other postretirement employee benefits (OPEB) proceeding. Parties simply have no right to appeal or seek reconsideration of Commission actions out of time. If AT&T concluded that the Commission's decision not to apply its add-back rules retroactively was incorrect, it was obligated to challenge that decision within 30 days, not *eight* years after the fact. The Commission must not be fooled by AT&T's tactics here.

In any event, to find that add back was implicit in price cap regulation would ignore the multitude of reasons why price cap carriers could have reasonably concluded that add back was not an integral part of price cap regulation *prior* to adoption of the add-back requirement in 1995. AT&T ignores that the rules and underlying orders did not expressly require add back. The Commission not only expressly admitted this in its *Add-back NPRM*, but further admitted that its underlying orders did not even mention the concept.[5] AT&T ignores that the Commission deemed it necessary to initiate a rulemaking proceeding to affirmatively require price cap LECs to add-back, rather than issue a clarification, which would have sufficed had the initial price-cap rules required LECs to add back. AT&T ignores that in certain instances add back could result

[5] *Price Cap Regulation of Local Exchange Carriers, Rate of Return Sharing and Lower Formula Adjustment*, Notice of Proposed Rulemaking, 8 FCC Rcd 4415 (1993) (*Add-Back NPRM*).

in sharing well beyond the one-year period,[6] which was inconsistent with the FCC's express findings that sharing is a "one-time reduction in the PCI for the next rate period."[7] Further, AT&T ignores the inherent differences between rate-of-return regulation and price-cap regulation. Rather than being an extension of rate-of-return regulation, price-cap regulation was an alternative form of regulation that had an entirely different set of rules and obligations. Given the foregoing, the Commission's failure to expressly require price cap LECs to add back in its initial price cap orders and rules could have lead many LECs to reasonably conclude that add back was not required under price cap regulation. And it is these very conclusions that the Commission must consider in determining whether any LEC's failure or decision to add back was an unreasonable practice.

AT&T argues that enforcement of the add-back rules would not constitute retroactive ratemaking because the Commission can clarify its rules during a tariff investigation. Once again, AT&T has mischaracterized the issue. The issue here is not whether application of the add-back rules constitutes retroactive ratemaking, but whether the Commission can retroactively apply a substantive rule change when evaluating whether a LEC engaged in an unreasonable practice. As previously discussed, the Commission has no such authority. The Commission has already confirmed that its add-back rule was a substantive rule change and such changes can

[6] *See* Ameritech Comments at 6. (Consider a simple example in which a LEC (choosing a 3.3% total offset) earns above 12.25% in year one. Assume also that the LEC would earn just under 12.25% without add back for the second and subsequent years. With an add back, the sharing amount caused by the earnings in year one would throw the LEC into sharing due to year two's earnings (year two's actual earnings plus year one's add back). This add back originally caused by earnings in year one would also push year three's and subsequent years' actual earnings into sharing levels as well. Thus, the add back for just one year's sharing amount could affect an indefinite number of year's rates — something clearly not intended by the Commission's price cap order.).

[7] *Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd 6786, 6803 (1990).

only be enforced prospectively, a well-settled principle under federal jurisprudence.[8] Thus, any price cap LEC's failure to add back cannot form the basis for rejection of its 1993 and 1994 tariffs.

Finally, AT&T argues that permitting some LECs to engage in add back and others not to would result in arbitrary application of the add-back rules, in clear violation of the Communications Act. But again AT&T ignores the realities in existence in 1993 and 1994. The fact is not only did the Commission's rules not expressly require add back, the Commission's underlying orders did not even mention the concept. Without any regulation, let alone guidance, from the Commission, carriers were left to evaluate the FCC's rules and underlying orders and draw their own conclusions as to whether the Commission envisioned add back under price cap regulation. This is not a situation where a particular LEC followed the add-back rules in 1993 and chose not to in 1994 or vice versa, as AT&T implies. Here, each LEC followed one method or the other, which, as the record aptly shows, was a reasonable interpretation of the Commission's rules. Price cap LECs must not be held liable for actions caused wholly by the Commission's failure to require price cap LECs to add back prior to 1995.[9]

[8] *Landgraf v. USI Film Products et al.*, 511 U.S. 244, 280 (1994).

[9] If the Commission concludes to the contrary and holds the SBC LECs liable for failing to add back or for adding back in 1993 and/or 1994, the it should not rely on the estimated sharing amounts provided by AT&T. The proper impact on sharing for each SBC entity is set forth in Attachment One.

CONCLUSION

For the foregoing reasons, the Commission should reject AT&T's arguments and conclude that a price cap LEC's failure to add back or decision to add back in computing its 1993 and 1994 sharing obligations was not an unjust or unreasonable practice under the Commission's pre-1995 price-cap rules.

Respectfully Submitted

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ATTACHMENT ONE

Total Sharing Amounts Due for SBC Telephone Companies if the FCC Requires Add-back

(Amounts shown below are in the thousands)

Ameritech 1993 Annual Filing	$5,060
Nevada Bell 1993 Annual Filing	$83
Ameritech 1994 Annual Filing	$9,563
Pacific Bell 1994 Annual Filing	$1,028
Nevada Bell 1994 Annual Filing	$1,370
Total SBC	**$17,104**

If SNET were required to remove its add-back adjustment, its total sharing liability would be $2,123.